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In the

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, AND STEPHEN E. PARKER,

Petitioners,

vs.

ALEXANDER F. TREADWELL, AS SECRETARY OF STATE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE National Association of REALTORS® IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE*, NATIONAL ASSOCIATION OF REALTORS®, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae*, the National Association of Realtors® submits this brief in support of the Petitioners, Patricia Anderson, Michael A. Hosein, and Stephen Parker.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The National Association of Realtors® (NAR) is a non-profit real estate professional association founded in 1908, incorporated in Illinois and maintaining its headquarters in Chicago, Illinois. NAR was created to promote and encourage the highest and best use of land, to protect and promote private ownership of real property, and to promote professional competence among real estate professionals. NAR's membership consists of persons engaged nationwide in all facets of the real estate business, including, but not limited to, brokerage, appraisal, management, and counseling. Consequently, NAR is a leading advocate of the interests of real estate professionals and real property owners throughout the United States.

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[1] The parties have consented to the filing of this brief. The letters of consent are filed with the Clerk of the U.S. Supreme Court herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation and submission of this brief.

In pursuit of these objectives and the betterment of the real estate profession, NAR engages in a wide range of activities, including promotion of equal opportunity in housing, promulgation and enforcement of a Code of Ethics, and providing programs in real estate education, legal compliance, neighborhood revitalization, and cultural diversity. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, some 1,500 local associations of REALTORS®, and approximately 860,000 "REALTOR®"[2] and REALTOR-ASSOCIATE® members.

NAR's interest in this case is driven by its far-reaching significance for NAR's members, since the holding of the court of appeals threatens to restrict or even eliminate the right of real estate professionals to communicate truthfully with the millions of real estate buyers and sellers who are their prospective clients and customers. NAR is equally concerned about the adverse impact the decision below will have on consumers' access to valuable real estate information, which this Court has recognized as "of vital interest . . . , since it may bear on one of the most important decisions (residents) have a right to make: where to live and raise their families." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96 (1977).

Successful commercial endeavors depend on the ability to communicate with potential customers and clients to describe and offer goods or services and solicit business. This principle is particularly true in the field of real

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[2] "REALTOR®" is a federally registered collective membership mark used by members of the NATIONAL ASSOCIATION OF REALTORS® to indicate their membership status.

estate. As noted, NAR's members are engaged in all phases of real estate practice, but the majority of NAR members—perhaps upwards of 80%—are engaged in residential brokerage and sales, where regular communications to and solicitation of prospective buyers and sellers of real estate is both commonplace and necessary. Such broker initiated contacts are of considerable importance to developing a client base and the relationships necessary for success. Indeed, active and regular solicitation of potential clients and customers takes on a heightened importance in a brokerage business like real estate, brokers secure clients by providing informative and reliable information about property and assurances of their personal commitment to customer/client service.

For these reasons, NAR has a keen interest in this case, and in this Court's clarification of the applicable constitutional standards governing regulation of truthful, non-misleading communications by real estate professionals with prospective clients and customers.

ARGUMENT

1. The practice of "prospecting" in real estate is well recognized as an invaluable technique of a successful real estate practice. Prospecting consists of real estate professionals initiating "cold-call" communications to residents in particular geographic areas in order to begin to establish relationships that may later lead to use of the services of the agent.[3] "Personal contact by agent" is cited

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[3] For a description of prospecting or "farming" and its importance, especially to new real estate agents, see Patti Broth-

(continued...)

by both buyers and sellers in one very recent study as the third most important factor in choosing a real estate agent, followed only by referrals from friends, neighbors and relatives and use of the agent in a previous transaction.[4]

Another study of "super salespeople" found an "extremely strong" correlation between success in real estate sales and "prospect(ing) and advertis(ing) to generate new business." Michael Abelson, *Understanding Super Salespeople*, a report prepared for the National Association of Realtors® and the Herbert U. Nelson Memorial Fund (1993), 27-28. That study also noted that all of the salespeople surveyed agreed "that they develop and obtain a mailing list," and that the most successful agents "spend more time prospecting and advertising to generate new business." *Id.*, at 50. Although some homeowners, pursuant to laws like that at issue in this case, may object to receiving real estate solicitations, materials distributed by real estate professionals to consumers often provide useful information and services, such as offering market evaluation of property or practical household management tips.[5] Moreover, although prospecting is primarily intended to reach potential sellers of real estate, it also simultaneously allows real estate professionals to communicate with potential *purchasers* of real

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(...continued)
erton, *New Agents Should Build a Foundation With a Farm*, Realty Times, http://realtytimes.com/rtnews/printrtpages/20000724_farm.htm (November 18, 2002).

[4] National Association of Realtors®, 2002 National Association of Realtors® Profile of Home Buyers and Sellers (2002).

[5] *Pearson v. Edgar*, 965 F.Supp. 1104, 1110 (N.D. Ill. 1997), Findings of Fact 22-25, 27-30.

estate, who may have or later develop a need for the services of a real estate professional in connection with a purchase.

The statute at issue here illustrates the disruptive and adverse effects suffered both by real estate professionals and consumers resulting from restrictions on real estate solicitation. As described in the Petition for Certiorari, New York Property Law subsection 442-h(3) permits the New York Secretary of State to designate a cease-and-desist zone where he "determines that *some* owners of residential real estate property . . . are subject to intense and repeated solicitations by real estate brokers . . . to place their property for sale" (emphasis added.) After the Secretary makes such a determination, it is unlawful for real estate brokers or agents to solicit any owner of residential property who has filed with the Secretary a statement expressing the desire not to be solicited. Real estate professionals often avoid solicitation of *any* owners within a cease-and-desist zone, however, and not simply those who have filed a "no solicitation" request with the Secretary of State. They fear risking the penalties for violating subsection 443-h(3) if a solicitation inadvertently reaches an owner who has placed his name on the "do not solicit" list maintained by the Secretary. See *Pearson v. Edgar*, 965 F.Supp. 1104, 1110 (N.D. Ill. 1997).[6] Thus, although a cease-and-desist zone may be

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[6] In particular, note Findings of Fact 69-73 (record citations omitted):

> 69. Therefore, many real estate brokers attempt to protect themselves from prosecution by not soliciting anyone at all in a community with an anti-solicitation list.

(continued...)

established by the Secretary at the initiation of "some" owners, the effect inevitably is to deny *all* owners within the zone the opportunity to receive communications that could be interpreted as real estate solicitations.

Even if real estate professionals elect to solicit homeowners within a cease-and desist zone who have not filed with the Secretary of State, residents of dwellings owned by owners who have filed still will be denied the opportunity to receive truthful, non-misleading information from real estate professionals. This is because residential property is defined in regulations promulgated pursuant to subsection 443-h(3) as one-, two- or three-family houses, including co-ops or condos, and real estate professionals must avoid solicitation of anyone at those addresses. N.Y. Comp. Code R. & Regs., tit 19, §175.17(d)(1)(i),(e).

(...continued)

70. This deterrent effect prevents brokers from communicating with residents who might be interested in receiving information regarding either their services or other community activities.

71. The fear of prosecution also forces the plaintiffs and other brokers not to advertise in communities with anti-solicitation lists thereby restricting access to information regarding the housing market.

72. Many individuals would benefit from such information since the purchase or sale of a home is often the biggest financial decision that many individuals will make in their lifetimes.

73. The statute also inhibits individuals from receiving information pertinent to their decisions on where to live and raise their families.

For these reasons, the statute here, and the Illinois statute declared unconstitutional in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998) and similar laws, see *infra* note 8, do *not* simply prevent real estate professionals from soliciting individual residents who have indicated a desire not to receive such communications. Other homeowners who do not object to receiving truthful, non-misleading communications from real estate professionals, and who in fact who may have a particular interest in receiving such information, will be denied the opportunity to receive it.

2. As the Petition for Certiorari correctly explains, the decision of the Second Circuit in this case directly conflicts with the Seventh Circuit's decision in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998). The conflict between these two decisions is, however, more than an intramural disagreement between two Circuits regarding the First Amendment principles governing restrictions on certain real estate brokerage practices. The decision below creates uncertainty, confusion and conflict regarding a legal issue of considerable importance to the real estate profession that was previously understood by the industry, and presumably by most legislative bodies who regulate the industry, to have been well-settled by *Pearson*.

Pearson was the culmination of over a decade of litigation over the constitutionality of a resident-activated real estate solicitation prohibition.[7] For real estate professionals, though, *Pearson* was not simply about that Illinois statute. In addition to the Illinois statute, a number of suburban Chicago municipalities had enacted

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[7] The complete history of the *Pearson* litigation is set forth in the Petition, note 8.

similar ordinances imposing resident-activated real estate solicitation prohibitions. The ordinances of five of those municipalities were challenged in *South-Suburban Housing Center v. Greater South Suburban Board of Realtors®*, 935 F.2d 868 (7th Cir. 1991), and the Seventh Circuit *sustained* the constitutionality of those ordinances. *Id.*, 935 F.2d at 886-93.

To reach that result the Seventh Circuit relied on *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988), a decision issued in the course of the litigation that concluded with the *Pearson* decision. The basis for the conclusion in *Curtis*, and thus that in *South-Suburban Housing Center*, was that the "reasonable fit" test of the First Amendment criteria applicable to commercial speech under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), is satisfied where a restriction is simply not overinclusive. *Id.*, at 892. That is, for a restriction on commercial speech to pass constitutional muster, it is sufficient if it does not preclude more speech than is necessary to serve the intended governmental interests. Both *Curtis* and *South-Suburban Housing Center* held that because resident-activated prohibitions on real estate solicitation operate to protect the privacy of the very persons offended by real estate solicitations, that is, those persons who had placed their names on the "do not solicit" list, those restrictions were not overinclusive, and thus constitutional. Both courts also asserted that underinclusiveness is not a constitutional defect under *Central Hudson*. (*Curtis*: "Mere underinclusiveness does not, however, amount to constitutional infirmity. . . . [a] restriction on commercial speech may well be valid where it 'directly advances the governmental interest asserted, and . . . is not more *extensive* than is necessary to serve that interest.' *Central Hudson*,

....", 840 F.2d at 1303; *South-Suburban Housing Center*: "[a]s in Curtis, the 'underinclusiveness' of the ordinance fails to prevent it from advancing the government's interest in protecting residential privacy." 935 F.2d at 892.)

Pearson overturned the analysis in *Curtis* and *South-Suburban Housing Center*, firmly grounding its holding on this Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) ("*Discovery Network* has changed the law of commercial speech on which [*Curtis* and *South-Suburban Housing Center*] were built." *Pearson*, 153 F.3d at 405.) *Pearson* established that the underinclusiveness of a resident-activated prohibition on real estate solicitation is as constitutionally fatal as over-inclusiveness. ("Here, the homeowner cannot ban any bothersome solicitation but only real estate solicitation. The distinction between real estate solicitation and other kinds of solicitation is a by-product of the statute's original purpose of preventing blockbusting and cannot, we think, satisfy the *Discovery Network* requirement of a 'fit' between [the state's] goals and [the state's] chosen means." *Pearson*, 153 F.3d at 404 (citations omitted).)

Pearson therefore brought certainty and clarity to the constitutional principles applicable to laws imposing resident-activated real estate solicitation prohibitions. In reliance on *Pearson*, real estate professionals and Realtor® associations subsequently challenged the constitutionality of a number of the solicitation restrictions in effect in suburban Chicago, including several of those previously upheld in *South-Suburban Housing Center*. Largely on the strength of the underinclusiveness analysis of *Pearson* and *Discovery Network*, those ordinances

were consistently declared unconstitutional or rescinded.[8] Undoubtedly other state or local governments that may have considered enacting similar real estate solicitation prohibitions did not do so because of the holding of *Pearson*.

Unfortunately for real estate professionals, the Second Circuit opinion below now reintroduces profound uncertainty regarding the constitutionality of prohibitions on

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[8] The South/Southwest Association of Realtors® challenged the resident-activated real estate solicitation prohibition ordinances in the suburban Chicago communities of Blue Island, Calumet City, Chicago Heights, Dolton, Glenwood, Hazel Crest, Matteson, Olympia Fields, Park Forest, Richton Park, Riverdale, South Holland and Lynwood. Most rescinded their ordinances under pressure from the Association and on the basis of *Pearson*, although in three instances the municipality resisted and the Association filed suit asserting *Pearson* as the basis to declare the ordinances unconstitutional. In each case the litigation was quickly resolved in favor of the Association with an adjudicated or agreed declaration that the ordinance was unconstitutional. *South / Southwest Association of Realtors® v. Dolton*, No. 99C3958 (N.D. Ill. Dec. 22, 1999), *South / Southwest Association of Realtors® v. Glenwood*, No. 99C7141 (N.D. Ill. Jan. 28, 2000), *South / Southwest Association of Realtors® v. Olympia Fields*, No. 98C 0174 (N.D. Ill. Apr. 6, 1999). Private communication with Philip C. Stahl, Grippo and Elden, counsel to the South/Southwest Association of Realtors®.

Not to be deterred any more than required, the Village of South Holland subsequently established a "Voluntary Non-Solicitation List," although it claims that "[T]he [*Pearson*] ruling (is) not applicable to local non-solicitation ordinances such as ours." http://www.southholland.org/nonlist/nonlist.htm.

real estate communications. This disharmony is made all the more troubling by the fact that the Second Circuit reached its conclusion based on precisely the same principle underlying the now superceded holdings in *Curtis* and *South-Suburban Housing Center*: that underinclusiveness is not a constitutional defect, and the absence of overinclusiveness is adequate to sustain the statute under *Central Hudson* ("New York's system of identifying zones in which real estate solicitations are voluminous and permitting homeowners in these zones to elect not to receive such solicitations at their homes has a reasonable 'fit' with the governmental interest in protecting privacy, ..." *Anderson v. Treadwell*, 294 F.3d 453, 464 (2nd Cir. 2002).)

Thus, prior to the decision below, real estate professionals in the Seventh Circuit and elsewhere relied on *Pearson*, and it's plain overruling of the contrary conclusions of *Curtis* and *South-Suburban Housing Center*, to challenge existing real estate solicitation ordinances and to oppose adoption of new ones. Real estate professionals and Realtor® associations were generally spared the burden and expense of initiating and pursuing litigation to enforce *Pearson's* holding that a resident-activated real estate solicitation prohibition is unconstitutional.

The Second Circuit thus not only reversed the district court ruling as to the New York Property Law, it resurrected the heretofore discredited interpretation of the *Central Hudson* "reasonable fit" test articulated in *Curtis* and *South-Suburban Housing Center*. It revived the previously well-settled question of whether such laws are constitutional. The ruling below further produces the incongruous and untenable result that whether real estate professionals can be denied the right to send

truthful, non-deceptive communications to prospective clients and customers may depend on the jurisdiction in which they practice their profession. For this reason, this Court should grant review to resolve this now unsettled issue and restore clarity to this important and recurring question.

3. Notwithstanding the holding in *Pearson* that resident-activated real estate solicitation prohibitions violate the First Amendment rights of real estate professionals, ordinances imposing such restrictions persist. Unless this Court grants review, courts faced with challenges to such restrictions now will be forced to choose between following the Second Circuit's holding or that of *Pearson*.

For example, the Fair Neighborhood Practices ordinance in effect in Southfield, Michigan, provides that

> It shall be unlawful for any person, firm, partnership, association or corporation which engages in the sale and/or listing of residential property for profit or commercial gain to solicit the sale or listing for sale for any purpose relating to the sale of any residential property, either by telephone, through the mail, in person or by any other method after the owner of such property has indicated through written notice a desire not to be solicited in accordance with the procedure outlined in this section.

City of Southfield (MI) Code, Ch. 122, Sec. 9.383(a).[9] The ordinance also contains provisions describing how residential property owners can file with the city a re-

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[9] http://livepublish.municode.com/13/lpext.dll/infobase 22/1/21af/25e4?f+templates&fn. . . .

quest not to be solicited. Section 9.386 provides that a violation of the ordinance is a misdemeanor that may be punished by a fine of up to $500 and 90 days imprisonment.

Similarly, section K of chapter 13, Article 2, subsection 1 of the Village Code of Oak Park, Illinois, entitled Unlawful Real Estate Practices, provides that it is unlawful

> For any person to solicit any property for sale or rental or the listing of any property for sale or rental at any time notice has been given that any owner or tenant of such real estate does not desire to sell or lease such real estate or does not desire to be solicited.

Oak Park (IL) Village Code Chapter 13, Article 2, section 2-1.[10] An owner or tenant who desires not to be solicited may give notice to the Village Clerk, who maintains for inspection a list of persons who have given such notice. The Clerk also must furnish a copy of that list to every real estate broker in the Village.

These ordinances are merely examples of why this Court should articulate clearly the applicable First Amendment principles. *Pearson* controls the result in a challenge to the Oak Park, Illinois ordinance. By contrast, a Michigan court addressing the Southfield ordinance would not be bound by *Pearson*, and would be free to apply the reasoning of the decision below to declare the ordinance constitutional. Other courts outside the Second or Seventh Circuits will be compelled to attempt to predict how this Court would reconcile the conflict between them.

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[10] http://www.sterlingcodifiers.com/IL/Oak%20Park/.

Moreover, the decision of the Second Circuit is likely to entice communities outside the Seventh Circuit to adopt resident-activated prohibitions or restrictions on real estate solicitations, *Pearson* notwithstanding. The very existence of Subsection 443-h(3) of New York Property law, at issue here, and the myriad of laws in Illinois declared unconstitutional in, and pursuant to, *Pearson*, illustrates the considerable legislative interest in adopting content-based resident-activated real estate communication restrictions. The decision below thus encourages and emboldens states and municipalities outside the Seventh Circuit to enact real estate solicitation prohibitions, with their attendant harm to significant First Amendment freedoms. NAR therefore urges this Court to grant the Petition for Certiorari to resolve the conflict between the holding below and *Pearson*, and to eliminate the uncertainty and controversy over the extent to which real estate solicitation is protected by the Constitution.

CONCLUSION

For the reasons set forth above, NAR respectfully urges this Court to grant the Petition for Certiorari.

DATED: November 21, 2002

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